(4)

No. 97-1287

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

HUGHES AIRCRAFT COMPANY AND HUGHES NON-BARGAINING RETIREMENT PLAN,
Petitioners,
v.

STANLEY I. JACOBSON, DANIEL P. WELSH, ROBERT E. MCMILLIN, ERNEST O. BLANDIN, and RICHARD E. HOOK,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE ASSOCIATION OF PRIVATE PENSION AND WELFARE PLANS IN SUPPORT OF PETITIONERS

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March 24, 1998

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

Pursuant to Rule 37.2 of the Supreme Court Rules, The Chamber of Commerce of the United States of America (the "Chamber") and The Association of Private Pension and Welfare Plans ("APPWP") respectfully move this Court for leave to file the accompanying brief *amici curiae* in support of petitioners Hughes Aircraft Company and Hughes Non-Bargaining Retirement Plan. Petitioners have consented to the filing of this brief. Respondents have refused to give their consent, thus necessitating the filing of this motion.

1. The Chamber is the world's largest business federation, with an underlying membership of more than three million businesses and organizations of every size, and in

every sector and region of the United States. The Chamber serves as the principal voice of the American business community. One of its most important functions has been to represent the interests of its members in litigation pending before the courts of the United States.

The Chamber's members have a vital interest in the proper interpretation and application of the Employee Retirement Income Security Act, 29 U.S.C. § 1001 *et seq.* ("ERISA"), because they collectively sponsor hundreds of thousands of employee benefit plans covered by ERISA. Many of these plans cover participants and beneficiaries in multiple states. Chamber members, accordingly, have a substantial interest in ensuring that ERISA is interpreted and applied in a uniform and consistent manner across the nation. The Chamber has sought to advance those interests by filing briefs in ERISA cases that present issues of exceptional importance to the business community. For example, the Chamber has participated as an amicus curiae before this Court in the following, recently decided ERISA cases: *Lockheed Corp. v. Spink*, 116 S. Ct. 1783 (1996); *Varity Corp. v. Howe*, 516 U.S. 489 (1996); *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73 (1995); *District of Columbia v. Greater Washington Bd. of Trade*, 506 U.S. 125 (1992); *Patterson v. Shumate*, 505 U.S. 123 (1992); *Ingersoll-Rand v. McClendon*, 498 U.S. 133 (1990); *FMC Corp. v. Holliday*, 498 U.S. 52 (1990); and *Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. 539 (1988).

2. The APPWP is a non-profit trade association founded in 1967 to protect and foster the growth of this nation's private employer-sponsored employee benefit plan system. The members of the APPWP include both small and large employers (including many Fortune 500 companies) which sponsor employee benefit plans, as well as numerous plan support organizations, such as consulting and actuarial firms, investment firms, banks, insurers and other professional benefit organizations. Collectively, its more than 240 members sponsor or administer plans covering more than 100 million plan participants, including plans that have required employee contributions. This broad-based membership provides the APPWP with substantial expertise and experience in the entire spectrum of issues relating to all types of benefit plans.

3. Movants have a substantial interest in this case because many of their members sponsor defined-benefit pension plans, and a substantial number of these plans (as well as other plans sponsored by their members) have permitted or required employee contributions. The Ninth Circuit held (i) that an employer's amendment of its contributory plan is a fiduciary act, subject to ERISA's strict fiduciary constraints; and (ii) that a plan may have been "constructively terminated" by an amendment that modified its benefit structure based on a vague "facts and circumstances" test. These holdings threaten the ability of employers that have sponsored contributory plans to adopt benefit structures responsive to their competitive needs—for example, by establishing early retirement window programs, enhancing pension benefits for active employees, adding participants employed by a newly acquired subsidiary, or reducing the rate of pension benefit accruals for new employees. Employers, which are obligated to fund any shortfall in a defined-benefit plan, will be less likely to offer defined-benefit plans if any amendment effected while such a plan is overfunded can trigger a termination and distribution of all "surplus" plan assets.

On both of these issues, the Ninth Circuit plainly erred and announced rules of law that directly conflict with the uniform decisions of other courts of appeals. If the Ninth Circuit's decision stands, it will spawn (yet another) class-action cottage industry, with countless plaintiffs' lawyers setting their sights on "surplus" plan assets. Every employer that sponsors a defined-benefit or other contributory plan that covers even a single participant or beneficiary

who resides in the Ninth Circuit will face an increased risk of ERISA litigation and potential liability. Employers and plan administrators nationwide will have little choice but to file anticipatory declaratory judgment actions in circuits other than the Ninth.

Because the court of appeals' erroneous decision in this case has sweeping implications for the design and administration of employee benefit plans, and destroys the nationwide uniformity that Congress sought to ensure, we believe this Court's review is urgently needed. For the foregoing reasons, Movants respectfully request that they be allowed to participate in this case and file the accompanying Brief of *Amici Curiae* in support of petitioners.

Respectfully submitted,

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE ASSOCIATION OF PRIVATE PENSION AND WELFARE PLANS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTERESTS OF THE *AMICI CURIAE* [1]

The interests of *amici* are set forth in the preceding motion for leave to file this brief.

[1] Pursuant to Rule 37.6 of the Rules of the United States Supreme Court, *amici* state that no counsel for a party has authored this brief in whole or in part, and that no person or entity, other than *amici*, their members, or their counsel, has made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

In this case, the Ninth Circuit decided two issues of critical importance under the Employee Retirement Income Security Act, 29 U.S.C. § 1001 *et seq.* ("ERISA")—and made hash of them both. Ignoring the plain text of ERISA and this Court's controlling precedents, the court of appeals held that: (1) if a benefit plan permits employees to contribute their own funds, an employer's actions as plan sponsor are transformed into fiduciary acts that may subject the employer to suit for breach of fiduciary duty under ERISA § 404; and (2) a defined-benefit pension plan can be deemed "constructively terminated" by an amendment that alters its benefit structure, even where the plan sponsor had no intent to terminate the plan and never initiated the steps required for plan termination under Title IV of ERISA, 29 U.S.C. §§ 1301-71. Both holdings are plainly wrong, and both are squarely in conflict with the uniform decisions of other courts of appeals. If these holdings are not reversed, they threaten to disrupt the ongoing operations of thousands of employee benefit plans, spawn nationwide class-action litigation over the lawfulness and effect of past amendments, and upset Congress's carefully constructed balance between protections afforded employees and burdens imposed on employers and plans.

1. Just two Terms ago, in *Lockheed Corp. v. Spink*, 116 S. Ct. 1783 (1996), this Court reversed the Ninth Circuit and ruled definitively that, when an employer amends its pension benefit plan, it acts in its capacity as settlor, not as a fiduciary. The Court made crystal clear that an employer is permitted to adopt, modify, or terminate its pension plan free from ERISA's fiduciary constraints. There is no basis in that decision, or in the text or structure of ERISA, for distinguishing pension plans that are funded solely by employers from those that require or accept employee contributions. In seeking to limit the holding in *Spink* to non-contributory plans and to announce a different, contrary rule for plans that receive employee contributions, the Ninth Circuit gave short shrift to this controlling precedent, the plain language of ERISA, and the uniform decisions of other courts of appeals.

The decision of the Ninth Circuit calls into question the lawfulness and validity of innumerable amendments to vast numbers of benefit plans that are not funded solely by the employer. Benefit plans that accept or require employee contributions are commonplace. Many employers offer contributory defined-benefit pension plans, just like the plan at issue in this case. Health plans also often require employees to make at least a modest contribution toward the cost of medical coverage for themselves and their families. And 401(k) plans, in which employees are able to defer part of their own income for retirement, are now the most common and the fastest growing type of retirement plan, especially among smaller businesses. If this decision stands, every amendment to any of these plans that, in form or effect, has benefited some employees more than others or redounded to the benefit of the employer—*i.e.*, virtually every substantive amendment—will be fodder for a class action lawsuit, with standards of liability to be determined case-by-case in future Ninth Circuit actions.

2. Section 4041 of ERISA says in plain English that the detailed procedures set forth in Title IV of ERISA constitute the "exclusive means" by which a defined-benefit plan may be terminated. 29 U.S.C. § 1341. Those procedures were not initiated in this case. Accordingly, the Hughes Non-Bargaining Retirement Plan (the "Plan") was not terminated within the meaning of ERISA. Yet the Ninth Circuit permitted respondents to proceed with a claim that, by making significant changes to the Plan, Hughes Aircraft Company ("Hughes") "constructively" terminated the Plan. The court of appeals' refusal to enforce the plain terms of ERISA places the Ninth Cir-

cuit in direct conflict with decisions of the Third, Fourth, and Fifth Circuits.

By adopting a vague, common-law standard of constructive termination, which requires consideration of "all of the facts and circumstances," the court of appeals has created the potential for class-action litigation every time a pension plan is amended. These suits may seek, as respondents do here, an immediate distribution if the pension plan's assets exceed (even temporarily) an actuarial estimate of its projected liabilities. Conversely, if the plan's assets are less than its estimated liabilities, a lawsuit might seek to compel the employer to make large additional contributions to fund the plan on a termination basis, even though the employer has complied fully with applicable annual funding requirements.

The *post hoc* determination that a plan has been constructively terminated may have serious adverse tax consequences for the employer and plan participants, jeopardize benefits accrued by participants since the date of "termination," and expose the Pension Benefit Guaranty Corporation ("PBGC") to billions of dollars of additional potential liability. The mere threat of a finding of constructive termination, moreover, will severely hamper the ability of employers which have sponsored contributory plans to adopt benefit structures responsive to current competitive needs—for example, by establishing early retirement window programs, enhancing pension benefits for active employees, adding participants employed by a newly acquired subsidiary, or reducing the rate of pension benefit accruals for new employees.

3. The court of appeals announced rules of law that directly conflict with the uniform holdings of every other court of appeals that has considered these issues. If the decision stands, every employer that sponsors a plan that covers so much as a single participant or beneficiary who resides in the Ninth Circuit will face an increased risk of

ERISA litigation and potential liability. This will create a tremendous incentive for employers and plan administrators to file anticipatory declaratory judgment actions in circuits other than the Ninth to insulate them from the prospect of Ninth Circuit-based lawsuits. Because the court of appeals' erroneous decision in this case has sweeping implications for the design and administration of employee benefit plans, and destroys the nationwide uniformity that Congress sought to ensure when it enacted ERISA, *amici* respectfully urge this Court to grant the petition for a writ of certiorari and reverse the decision of the Ninth Circuit.

ARGUMENT

I. THE NINTH CIRCUIT'S OPINION CONFLICTS WITH CONTROLLING SUPREME COURT PRECEDENT, THE PLAIN LANGUAGE OF ERISA, AND THE UNIFORM DECISIONS OF OTHER COURTS OF APPEALS

A. An Employer Does Not Act as a Fiduciary When It Amends or Terminates a Benefit Plan to Which Employees Have Contributed

In their Second, Fifth, and Sixth Claims, respondents allege that Hughes breached the fiduciary duty of loyalty set forth in ERISA § 404(a)(1), committed transactions prohibited by ERISA § 406, and failed to operate the Plan (a contributory defined-benefit pension plan) "in accordance with the documents and instruments governing [the Plan]" (as required by ERISA § 404(a)(1)(D)), when it amended the Plan in 1989 to create an early retirement program, and in 1991 to introduce a noncontributory benefit structure. *See* Complaint (Pet. App. 131a-44a). These claims are squarely foreclosed by this Court's decision in *Lockheed Corp. v. Spink*, which held that "[p]lan sponsors who alter the terms of a plan do not fall into the category of fiduciaries." 116 S. Ct. at 1789. *Spink* made crystal clear that, when employers undertake to adopt, amend or terminate ERISA plans, "they do not

act as fiduciaries, . . . but are analogous to settlors of a trust." *Id.*

The Ninth Circuit held that *Spink* did not control this case because the defined-benefit plan at issue in *Spink* did not accept employee contributions. According to the court of appeals, because the Plan accepts employee contributions, "Hughes was acting as a fiduciary when it 'amended' the [P]lan." Pet. App. 16a. As Judge Norris observed in dissent (Pet. App. 37a), this distinction is baseless.

The question in *Spink* was whether this Court would "extend" its ruling in *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73 (1995)—that the amendment of welfare benefit plans is not a fiduciary act—to encompass amendments to pension benefit plans. *Spink*, 116 S. Ct. at 1789. The Court observed in that regard that ERISA's "definition of fiduciary makes no distinction between persons exercising authority over welfare benefit plans and those exercising authority over pension plans. It speaks simply of a 'fiduciary with respect to a plan' 29 U.S.C. § 1002(21)(A), and of 'management' and 'administration' of 'such plan,' *ibid.* And ERISA defines a 'plan' as being either a welfare or pension plan, or both. *See* § 1002(3)." *Id.* at 1789-90. Likewise, the Court noted, "the fiduciary duty provisions of ERISA are phrased in general terms and apply with equal force to welfare and pension plans." *Id.* at 1790 (citing 29 U.S.C. § 1104(a)). Because neither ERISA's definition of "fiduciary" nor its provisions respecting the duties of fiduciaries differentiate between welfare and pension plans, the Court concluded that "the rules regarding fiduciary capacity—including the settlor-fiduciary distinction—should apply to pension and welfare plans alike." *Id. Spink* announced a general rule that "the act of amending a pension plan" —like the act of amending a welfare plan—"does not trigger ERISA's fiduciary provisions." *Id.*

The Court's decision in *Spink* did not distinguish, and left no room for any distinction, between contributory and

non-contributory plans. Just as ERISA's definiiton of "fiduciary" and its provisions respecting fiduciary duties do not differentiate between welfare and pension plans, they make no distinction between contributory and non-contributory plans. Section 3(21)(A) of ERISA provides that a person is a fiduciary "to the extent" that he or she exercises discretionary authority or control over a plan's management or administration or the investment of plan assets. 29 U.S.C. § 1002(21)(A); *see Lockheed Corp. v. Spink*, 116 S. Ct. at 1789; *Johnson v. Georgia-Pacific Corp.*, 19 F.3d 1184, 1188 (7th Cir. 1994) (Easterbrook, J.). ERISA thus defines fiduciary status solely by reference to the functions a person performs for a benefit plan, not by the source of the plan's funds. Paraphrasing the Court's decision in *Spink*, "the fiduciary duty provisions of ERISA are phrased in general terms and apply with equal force" to contributory and non-contributory plans. 116 S. Ct. at 1790.[2]

To the extent the court of appeals attempted to square its holding with ERISA's functional conception of fiduciary status, its reasoning does not withstand scrutiny. The court suggested that "Hughes was carrying out discretionary functions relating to plan management and administration when it 'amended' the plan to use surplus assets attributable in part to employee contributions" for three reasons: (1) the amendment "triggered ERISA's statutory duties with respect to assets attributable to employee

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[2] Contrary to the Ninth Circuit's view (Pet. App. 8a-9a), the fact that ERISA provides certain specific safeguards with respect to contributory pension plans, *see* 29 U.S.C. § 1053 (minimum vesting and nonforfeiture requirements); 29 U.S.C. § 1344(d)(3)(A) (equitable distribution upon termination), does not afford the courts authority to fashion other, non-statutory safeguards from federal common law. As this Court recognized in *Mertens v. Hewitt Associates*, 508 U.S. 248 (1993), ERISA is "an enormously complex and detailed statute that resolved innumerable disputes between powerful competing interests—not all in favor of potential plaintiffs." 508 U.S. at 262.

contributions"; (2) the amendment caused a disposition of the Plan's assets, which "necessarily affected the management and administration of the [P]lan"; and (3) "the use of surplus assets from one plan to fund another plan that benefits new employees who were never participants in the first plan" may "increase the risk of underfunding and non-payment." Pet. App. 16a. Each of these rationales suffers the same fatal defect: Irrespective of whether an amendment to a plan triggers fiduciary duties, impacts the management or administration of the plan, or adversely affects the plan's financial condition, the amendment is itself not a fiduciary act. Were the rule otherwise, *Spink* would have come out the other way, because Lockheed's creation of an early retirement option funded by existing plan assets unquestionably affected the financial condition of Lockheed's pension plan.

Finally, there is no merit to the court of appeals' sugtion that Hughes acted in a fiduciary capacity when amending the Plan because "when a plan is funded by both employer and employee contributions, both the employer and the employees are *co*-settlors." Pet. App. 14a. This "*co*-settlors" concept—which the court appears to have fabricated from whole cloth—has no application to plans covered by ERISA. Section 3(16)(B) of ERISA defines "plan sponsor" (the ERISA equivalent of a common-law settlor) of a single-employer plan, contributory or non-contributory, to be "the employer." 29 U.S.C. § 1002(16)(B). Thus, Hughes (and Hughes alone) is the sponsor/settlor of the Plan.[3] Moreover, even if Hughes'

[3] The Court appears to have introduced this "co-settlors" concept in order to reconcile ERISA's fiduciary duties with the Court's misapprehension that, under 29 U.S.C. § 1344, employees have a claim to the "surplus" assets of contributory defined-benefit plans. As the nomenclature suggests, however, what participants in "defined-benefit" plans have a right to are the *benefits* promised by such plans. The employees have no direct claim to the *assets* of a defined-benefit plan unless the plan has been terminated in accordance with the provisions of Title IV of ERISA. *See* Pet. 16-20.

employees were considered *co*-settlors, because the Plan gives the power to amend only to Hughes, the existence of other settlors would not transform Hughes' exercise of that power into a fiduciary function.

Every other court of appeals that has ruled on the question has held that, when an employer amends a contributory pension plan, it does so as settlor of the plan, not as a fiduciary. *See Malia v. General Elec. Co.*, 23 F.3d 828, 833 (3d Cir.), *cert. denied*, 513 U.S. 956 (1994); *Johnson v. Georgia-Pacific Corp.*, 19 F.3d at 1188; *Musto v. American Gen. Corp.*, 861 F.2d 897, 912 (6th Cir. 1988), *cert. denied*, 490 U.S. 1020 (1989). Indeed, we are unaware of any decision, other than the Ninth Circuit's decision in this case, which has held that the well-established distinction in ERISA between an employer's actions as plan settlor and its actions as plan fiduciary is in any way altered because a benefit plan requires employee contributions. The decision in this case destroys a uniform rule grounded in two decades of case law, which culminated just two Terms ago in *Spink*.

B. Title IV of ERISA Establishes the Exclusive Means for Terminating a Defined-Benefit Pension Plan.

Section 4044 of ERISA requires a plan administrator to distribute the assets of a single-employer defined-benefit pension plan "[i]n the case of [its] termination." 29 U.S.C. § 1344(a). In their Fourth Claim, respondents allege that, by amending the Plan in 1991 to establish a new non-contributory benefit structure, Hughes "terminated the Plan within the meaning of ERISA § 4404" [*sic*], Complaint ¶ 42 (Pet. App. 141a), and that respondents are therefore entitled to share in an equitable distribution of the Plan's residual assets, *id.* ¶¶ 42-43. Relying initially upon a superseded 1963 Treasury Regulation, 26 C.F.R. § 1.401-6(b)(1), and the common-law concept of a "wasting trust," the court of appeals concluded that respondents' claim of "constructive termination" stated a

cause of action, and ruled that whether a plan has been constructively terminated must be determined based on "all the facts and circumstances in a particular case." Pet. App. 11a n.3, 22a-23a.

Petitioners and their *amici* pointed out in briefs urging rehearing that the cited Treasury Regulation reflected pre-ERISA law, and that ERISA § 4041(a)(1) and post-ERISA Treasury Regulations make clear that compliance with the requirements of Title IV or ERISA is the *exclusive means* of terminating a single-employer defined-benefit plan. *See* 29 U.S.C. § 1341(a)(1); 26 C.F.R. § 1.411(d)-2(c)(2). The PBGC, which filed an *amicus* brief supporting rehearing, explained that, under Title IV of ERISA, Hughes could not have terminated the Plan without first filing a notice of intent with the PBGC and following specified statutory termination procedures. Brief for PBGC at 5-6, *Jacobson v. Hughes Aircraft Co.*, No. 93-55392 (9th Cir. Feb. 20, 1997). Respondents did not suggest, nor could they, that these prerequisites had been met. In response to these filings, the panel amended its original opinion to delete one of its two references to the pre-ERISA Treasury Regulation (*see* Pet. App. 22a-23a, 49a-52a), but inexplicably retained the other citation to the superseded regulation and stood by its holding that whether the Plan was "constructively terminated" is a matter that would have to be decided by the district court based upon an examination of the facts and circumstances of the case.

The court of appeals' holding on this issue is indefensible. ERISA § 4041 states without qualification that Section 4041 (which addresses voluntary terminations by a plan administrator) and Section 4042 (which addresses involuntary terminations by the PBGC) are the "[e]xclusive means" of terminating a single-employer defined-benefit pension plan. 29 U.S.C. § 1341(a)(1); *see also* H.R. Rep. No. 99-241, pt. II, at 41 (1985) ("[T]he

Committee intends that ERISA provide the sole and exclusive means under which a qualified pension plan may be terminated."), *reprinted in* 1986 U.S.C.C.A.N. 685, 699; H.R. Rep. No. 99-300, at 289 (1985), *reprinted in* 1986 U.S.C.C.A.N. 756, 940. To the extent that this language requires any amplification, the PBGC, which has been charged by Congress with the responsibility for administering Title IV of the Act, concurs that, "[a]bsent qualifying for [a standard or distress termination under ERISA §§ 4041 or 4042], a single-employer plan cannot voluntarily terminate." 52 Fed. Reg. 33,318 (1987); 29 C.F.R. § 4041.3(a) (Part IV of ERISA provides "[e]xclusive means of voluntary plan termination"). Treasury Regulations adopted after ERISA was enacted are consistent with this principle, providing that an ERISA plan covered by Title IV is "considered terminated" on the date a plan is "terminated . . . under section 4041 . . . or . . . section 4042 of [ERISA]." 26 C.F.R. § 1.411(d)-2(c)(2). These regulations confirm that the regulation relied upon by the court of appeals reflects the applicable law "prior to amendment by the Employee Retirement Income Security Act of 1974." 26 C.F.R. § 1.401-0(a).[4]

The court of appeals erred when, in the face of unequivocal statutory language, supported by the agencies charged with its administration, it relied on the common-law concept of "wasting trusts" to support a charge of "constructive" termination. *See* Pet. App. 11a n.3 (citing *In re Gulf Pension Litig.*, 764 F. Supp. 1149, 1201-05 (S.D. Tex. 1991), *rev'd in part on other grounds sub nom. Borst v. Chevron Corp.*, 36 F.3d 1308, 1313 n.6 (5th Cir. 1994)[5], *cert. denied*, 115 S. Ct. 1699 (1995)).

[4] Treas. Reg. § 1.401-6 remains applicable for governmental plans and church plans, to which I.R.C. § 411 generally does not apply. *See* 26 U.S.C. § 411(e).

[5] Even if the "wasting trust" doctrine were a viable concept under ERISA, we fail to see how a plan in which active employees continue to accrue additional benefits could be considered a "wast-

This Court has explained time and again that, while it is appropriate to look to common-law concepts to determine the meaning of undefined statutory terms or otherwise to fill the interstices of ERISA (*see Varity Corp. v. Howe*, 516 U.S. 489, 502 (1996); *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110-11 (1989)), "[t]he authority of courts to develop a 'federal common law' under ERISA is not the authority to revise the text of the statute." *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 259 (1993) (citation omitted); *see also Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54 (1987); *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146-47 (1985).[6]

In accordance with ERISA's plain language and clear congressional intent, every other court of appeals that has ruled on the issue has concluded that "strict compliance with [Title IV] is the *sole means* by which a pension plan subject to the provisions of ERISA may be terminated." *Phillips v. Bebber*, 914 F.2d 31, 34 (4th Cir. 1990) (emphasis added); *accord American Flint Glass Workers Union v. Beaumont Glass Co.*, 62 F.3d 574, 578-79 (3d Cir. 1995) (same); *Pension Benefit Guarantee Corp. v. Pritchard (In re Esco Mfg. Co.)*, 50 F.3d 315, 316 (5th Cir. 1995) ("Section 1341 allows for termination of an ERISA plan only by the plan administrator or the PBGC and states that a single-employer plan may be terminated only in accordance with that section.").

Respondents do not allege that the Plan was terminated pursuant to the procedures required by Title IV of ERISA. They do not assert that Hughes filed the written notice of intent to terminate required by ERISA § 4041(a)(2), or that the PBGC applied for the appointment of a trustee pursuant to ERISA § 4042(b). Indeed, by respondents' own acknowledgement, employees continue to accrue benefits under the Plan, *see* Complaint ¶¶ 27-30 (Pet. App. 138a), which cannot occur when a Plan has been terminated under Title IV. *See Blessitt v. Retirement Plan for Employees of Dixie Engine Co.*, 848 F.2d 1164, 1171 (11th Cir. 1988) ("The three agencies charged with administering ERISA—the PBGC, the IRS, and the Department of Labor—all concur that benefit accrual ceases when a plan terminates."). These undisputed facts prove *as a matter of law* that the Plan was not terminated. The court of appeals erred when it permitted respondents to survive a motion to dismiss by alleging an ultimate conclusion—that the Plan was terminated within the meaning of Title IV of ERISA—which their factual allegations plainly did not support.[7]

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ing trust." At common law, the concept was limited to circumstances in which the purposes of a trust had been "fully performed without exhausting the trust estate." *Restatement (Second) of Trusts* § 430 (1959). Because active employees are continuing to accrue benefits under the contributory benefit structure, the purposes of this aspect of the Plan have not been "fully performed," and, notwithstanding the existence of any current surplus, there is no assurance that these purposes will be fully performed without exhausting the assets of the plan.

[6] Notwithstanding its discussion of wasting trusts, the court in *In re Gulf Pension* appears to have recognized that a plan cannot be terminated absent compliance with Title IV. *See* 764 F. Supp. at 1204, 1215-16. At any event, the Fifth Circuit has since ruled squarely that a defined-benefit pension plan "may be terminated only in accordance with" ERISA § 4041. *Pension Benefit Guarantee Corp. v. Pritchard (In re Esco Mfg. Co.)*, 50 F.3d 315, 316 (5th Cir. 1995).

[7] As petitioners explain (Pet. 20 n.6), the Ninth Circuit also erred as a matter of law in failing to dismiss respondents' allegation that the 1991 amendment created a second, distinct, noncontributory plan, because it is undisputed that the contributory and noncontributory benefits were paid from a single trust. *See* 26 C.F.R. § 1.414(1)-1(b)(1) ("A plan is a 'single plan' if and only if, on an ongoing basis, all of the plan assets are available to pay benefits to employees who are covered by the plan and their beneficiaries. . . . A plan will not fail to be a single plan merely because . . . [t]he plan has several distinct benefit structures which apply either to the same or different participants."); 26 C.F.R. § 1.410(b)-7(b) (same). As Judge Norris observed in dissent, the "1991 amendment did not create a separate pension plan; it merely added an alternative benefit structure under the existing Plan." Pet. App. 30a-31a.

II. THE DECISION OF THE COURT OF APPEALS THROWS INTO DOUBT THE VALIDITY AND EFFECT OF AMENDMENTS TO COUNTLESS EMPLOYEE BENEFIT PLANS AND, IF NOT REVERSED, WILL EXPOSE PENSION PLANS AND THE FEDERAL COURTS TO AN ONSLAUGHT OF CLASS-ACTION LITIGATION

The lower court's holding that the amendment of a contributory plan is a fiduciary act will subject employers to the risk of massive retroactive liability and may cause the demise of benefit plans that afford beneficiaries the opportunity to contribute funds. The impact of the decision is staggering. Employers sponsor contributory defined-benefit pension plans with more than $60 billion in assets and covering more than one million employees. *See* Pet. App. 49a-50a. In addition, most of this nation's health plans require employees to make at least a modest contribution toward the cost of medical coverage for themselves and their families. *See, e.g.*, Office of Chief Economist, Department of Labor, *A Look at Employers' Costs of Providing Health Benefits* (July 31, 1996) (76% of full-time employees in medium and large firms contributed toward employer-provided health premiums for family coverage in 1993). 401(k) plans, in which employees are able to defer part of their own income for retirement, are now the most common and the fastest growing type of retirement plan, especially among smaller businesses. Jeffrey A. Meder, *Employers See Duty to Offer Pension Plan, But Ask Employees To Do More*, 48 Employee Ben. Plan Rev. 40 (Mar. 1994) (73% of new retirement plans adopted within the last five years were 401(k) plans. By holding that the employers who sponsor these plans are subject to ERISA's strict fiduciary standards with respect to their decisions respecting plan design and amendment, the court of appeals has thrown into question the validity and effect of countless amendments, and paralyzed these employers' ability to modify the terms and structure of their plans in response to changing market conditions.

The standard of liability applied in this case—which appears to turn on whether an amendment benefited some employees more than others—demonstrates why Congress did not hold employers to fiduciary standards. Employers design benefit plans to motivate employee behavior, and to that end they frequently modify plan structure and plan benefits in ways that purposefully differentiate among classes of employees; for example, to attract talented employees from competitors, to settle strikes and unfair labor practice charges, or to retain employees or increase turnover. The Supreme Court specifically held in *Spink* that these amendments constitute a permissible use of plan assets. 116 S. Ct. at 1791. The Ninth Circuit, however, has once again placed employers who enact these commonplace amendments in legal jeopardy. If employers cannot modify contributory benefit plans to respond to changing competitive conditions without the risk of liability under ill-defined anti-inurement, fiduciary duty, and prohibited transaction rules, they will increasingly elect not to offer such plans.

That turn of affairs would not promote the interests of beneficiaries. As the record in this case indicates, plans that offer participants the chance to contribute their own funds often afford those participants a higher level of defined benefits to support their retirement. There can be no question, however, that, if this decision stands, employers will have every incentive to avoid the creation of such opportunities in the future. Under the court of appeals' decision, employers would retain far more flexibility, and far less exposure to liability, by prohibiting employee contributions.

The court of appeals' adoption of a common-law theory of "constructive termination" will similarly displace important legal principles established by ERISA. When employers amend their plans, they commonly extend new benefit schedules only to current or future employees.

The notion that such an amendment—or perhaps other "facts and circumstances"—may effect a "constructive termination" of a plan places innumerable plans in immediate jeopardy. How is an employer or plan administrator to decide if its plan was "constructively" terminated when, for example, it created an early-retirement incentive or modified the contribution formula for current or future employees? Are all employers now required to review all past amendments to determine whether a plan was overfunded at the time of the amendment? By how much does a plan have to be overfunded to qualify as a "wasting trust"? If the decision of the court of appeals is not reversed, these become critical questions, with serious practical and tax consequences for the employer and its employees. Moreover, because ERISA provides that accruals must cease immediately upon plan termination, *Blessitt*, 848 F.2d at 1171, the Ninth Circuit's decision places at risk all benefits accrued by active employees since the "constructive termination." *See* Pet. App. 48a (Norris, J., dissenting).

The decision of the court of appeals creates an irresistible incentive for forum shopping by class-action counsel. Given the interstate reach of many employee benefit plans, and the liberal venue and universal service of process provisions of ERISA, every plan with so much as a single participant or beneficiary who resides in the Ninth Circuit will be exposed to the threat of litigation there on behalf of all of its participants or beneficiaries nationwide.[8] The Ninth Circuit's opinion represents an open invitation to plaintiffs' lawyers across the country to attack and dismantle benefit plans. Those suits may seek, as respondents do here, to have surplus assets distributed under

[8] *See* 29 U.S.C. § 1132(e)(2) (affording nationwide service of process and allowing suit to be brought in any district where the plan is administered, where an alleged breach took place, or where the defendant resides or may be found).

ERISA § 4044 if a pension plan's assets exceed (even temporarily) an actuarial estimate of the plan's projected liabilities. Conversely, if the plan's assets at the time of amendment are less than its estimated liabilities, a lawsuit might seek to compel the employer to make large additional contributions to fund the plan on a termination basis pursuant to ERISA § 4041(c), even though the employer has complied fully with the annual funding requirements of ERISA § 302 and Internal Revenue Code § 412.

Plan administrators, in turn, who are duty-bound not to implement plan amendments that violate provisions of ERISA, 29 U.S.C. § 1104(a)(1)(D), and may be held personally liable to make the plan whole for benefits paid under an amendment that violates the anti-inurement rules, 29 U.S.C. § 1109, will have no choice but to seek declaratory relief proactively (in forums other than the Ninth Circuit) to obtain guidance respecting plan administration and to insulate themselves from the threat of Ninth Circuit-based lawsuits.[9] Such litigation will only contribute to the growing attitude of employers that the legal regulation of employee benefit plans has made them too risky and too expensive.

CONCLUSION

This Court has repeatedly intervened in ERISA cases when aberrational decisions by lower courts have threatened to upset Congress's carefully crafted scheme by imposing additional, nonstatutory burdens on employers and plans. *See, e.g., Lockheed Corp. v. Spink*, 116 S. Ct. 1783 (1996); *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73 (1995). Regrettably, this case necessitates the same

[9] This would be all the more true if the plan is administered by an independent third-party administrator. A third-party administrator's expertise is in day-to-day administration of plan. They typically have little knowledge about the employer's business, and would have no way to know whether the plan amendments provide too great a benefit to the employer compared to the gain to participants and beneficiaries.

corrective action. Because the court of appeals' erroneous decision in this case has sweeping implications for the amendment of employee benefit plans, and destroys the nationwide uniformity that Congress sought to ensure, *amici* respectfully urge this Court to grant the petition for a writ of certiorari and reverse the decision of the Ninth Circuit.

Respectfully submitted,

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